

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2841-CR

Cir. Ct. No. 2008CT573

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. MISKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ We reject Michael S. Miske's claim that law enforcement officers lacked reasonable suspicion to stop and detain him on an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

unlit back country road while they were investigating a report of a battery by a member of a motorcycle gang known to be prone to violence. The officer's questioning of Miske, after he voluntarily stopped at the scene of an investigation, was reasonable because it promoted the general public interests of ensuring officer safety and obtaining identifying information. Therefore, we affirm.

¶2 After being charged with operating a motor vehicle while intoxicated, WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)3., and operating a motor vehicle with a prohibited alcohol concentration, §§ 346.63(1)(b) and 346.65(2)(am)2., Miske filed a motion to suppress based upon the lack of reasonable suspicion to stop him. After the evidentiary hearing, the State argued that the events involving Miske constituted a valid *Terry*² investigative stop; the State asserted that although Miske's stop was voluntary, he acquiesced to the law enforcement officer's show of authority. Miske countered that this was not a valid *Terry* stop because the officer did not have a reasonable suspicion that any criminal activity was afoot and he was not free to leave. The circuit court denied the motion, finding that it was a reasonable stop under the totality of the circumstances.

¶3 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, whether those facts establish reasonable suspicion to stop is a question of law which we review de novo. *See State v. Waldner*, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996).

² *Terry v. Ohio*, 392 U.S. 1 (1968).

¶4 Miske did not appear at the suppression hearing. Consequently, the only testimony was from the law enforcement officers involved in the events leading to Miske's arrest. Around 1:00 a.m. on May 26, 2008, Sheboygan County Sheriff's Deputy Steven Wimmer requested backup after being dispatched to the Monkey Business bar on Crooked Lake to investigate the complaint of battery involving members of the Top Hat motorcycle gang. The only backup officers were DNR law enforcement officers, Jason Quast and Reagan Arndt. Wimmer met Quast and Arndt on Crooked Lake Drive, more than one-quarter mile from the bar. The DNR officers parked, one behind the other, on the north side of the road and Wimmer parked opposite them on the south side of the road, leaving on his emergency red and blue flashing lights. There was no more than eight to ten feet of separation between the law enforcement vehicles. The officers described Crooked Lake Drive as a narrow, asphalt town road with fog lines but not a painted center line and at 1:00 a.m. it was dark, without any ambient lighting.

¶5 The officers met in the middle of the road, where Wimmer explained to the DNR officers that they were dealing with a motorcycle gang. The DNR officers were to serve as cover officers. Shortly thereafter, Wimmer stopped a motorcyclist coming from the direction of the bar and Arndt served as backup. Not long after the stop, additional motorcycles were heard approaching. Initially Wimmer did not know the direction of travel, but when he looked over his shoulder, they were coming down Crooked Lake Drive in his direction.

¶6 Quast testified that while Wimmer was engaged with the motorcyclist, he saw two motorcycles slow down and turn onto Crooked Lake Drive. Because of his concern for the deputy's safety, Quast started to walk toward the two motorcycles. As he approached, the motorcycles stopped without

being flagged down, and he motioned to them that he wanted to speak with them.

Quast testified:

But when I asked them, “Where are you headed?” and they said, “To the bar,” that raised a red flag to me for two instances, two situations. First, for Officer Wimmer’s safety, because he was still in the middle of his investigation, and I didn’t know the totality of the circumstances of whether these folks were part of this group that was alleged to be at the bar or not, so I needed to clarify what the whole situation was.

¶7 At this time, Arndt came to assist Quast. Arndt went to talk to the motorcyclist subsequently identified as Miske. Quast stayed with a motorcyclist identified as Brian McGaw. Quast asked them where they were coming from:

Mr. McGaw stated, “From Dundee,” to which I asked, “Did you come from one of the bars or taverns, establishments?” And he indicated that they did. It raised my suspicion, because his speech was slightly slurred. His eyes were glossy, but not bloodshot. And in asking him then, “Did you ingest any intoxicating beverages?” he said, “Yes, while I had a hamburger.” When I asked Mr. Miske that same question, “Have you consumed any alcoholic beverages?” Mr. Miske admitted that he had. And I noticed that his speech was much more slurred than Mr. McGaw’s.

¶8 On appeal, Miske dwells on the failure of any of the officers to interrogate him concerning the potential battery at the Monkey Business bar. He argues, “[T]he officers never fulfill the purpose of the stop because there was no attempt to confirm or dispel the officer’s suspicion that Miske engaged in criminal activity.”

¶9 Contrary to the concession of the State at the suppression hearing³ and the findings of the circuit court,⁴ the events leading to Miske’s arrest were not a *Terry* stop, which occurs when a police officer under appropriate circumstances temporarily stops an individual while the officer possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot. *Waldner*, 206 Wis. 2d at 55. Our conclusion, that the facts do not constitute a *Terry* stop, does not require reversal; as we explain, the Fourth Amendment is not involved because all the police were doing were asking simple questions, during a consensual encounter, to establish where Miske and his companion were headed.

¶10 The seizure of Miske was done without a warrant issued under the Fourth Amendment.

Police conduct that is not subject to the requirements of the Warrant Clause of the Fourth Amendment is tested under the Fourth Amendment’s general prohibition against unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). To determine whether a search or seizure is “unreasonable,” the court first determines whether the initial interference with an individual’s liberty was justified, and then considers whether subsequent police conduct was reasonably related in scope to the circumstances that justified the initial interference. *Id.* at 19-20.

State v. Griffith, 2000 WI 72, ¶26, 236 Wis. 2d 48, 613 N.W.2d 72.

³ We are not bound by the legal concessions of a party. *Fletcher v. Eagle River Mem’l Hosp., Inc.*, 156 Wis. 2d 165, 178-80, 456 N.W.2d 788 (1990).

⁴ It is well established that if a circuit court reaches the proper result for the wrong reason, it will be affirmed. *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984). An appellate court may sustain a circuit court’s holding on a theory or on reasoning not presented to the trial court. *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

¶11 The result in this case is dictated by *Griffith*, where police lawfully stopped a car and asked Griffith, a backseat passenger, for his name and date of birth. *Id.*, ¶43. *Griffith* held: “In the absence of any reasonable, articulable suspicion, police may ask questions, request identification, and ask for consent to search, ‘as long as the police do not convey a message that compliance with their requests is required.’” *Id.*, ¶39 (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)). While such questioning does not constitute a “seizure” under the Fourth Amendment, questioning “can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop.” *Griffith*, 236 Wis. 2d 48, ¶¶53-54. “To determine whether the intrusion was unreasonable, we must weigh the public interest served by the questioning against the incremental liberty intrusion that resulted from the questioning.” *Id.*, ¶38.

¶12 When Miske and his partner stopped, they were on a narrow road, two DNR vehicles were parked on one side of the road and a sheriff’s squad with its emergency lights flashing was parked on the opposite side, leaving a narrow, eight to ten foot gap; also, in front of the squad, Wimmer was engaged with the motorcyclist he had stopped earlier. Miske and his partner did not stop in response to a visible or audible signal to stop.⁵ Rather, the situation created two choices: either turn around or stop. Miske and his partner were free to do either; they voluntarily chose to stop.

⁵ WISCONSIN STAT. § 346.04(2t) requires a motorist to obey a “visible or audible signal to stop his or her vehicle.” Quast testified that he did not have to signal Miske and his companion to stop; they stopped their motorcycles voluntarily.

¶13 Quast approached Miske and his companion after he had been told by Wimmer there was a reported battery to a female in the Monkey Business bar. Wimmer also told the DNR officer that the suspect they were looking for was a male and may be involved with the Top Hat motorcycle gang. The deputy told Quast that the gang was prone to violence, and it was unknown how many of them were in the bar.

¶14 Considering the totality of the circumstances, Quast had concerns and asked Miske and his companion where they were headed. As he explained:

If they had at that point in time said, “We made a wrong turn,” or “This isn’t our stop or our turn, I am sorry, I am going to continue on,” I would have let them. But when I asked them, “Where are you headed?” and they said, “To the bar,” that raised a red flag to me for two instances, two situations. First, for Officer Wimmer’s safety, because he was still in the middle of his investigation, and I didn’t know the totality of the circumstances of whether these folks were part of this group that was alleged to be at the bar or not, so I needed to clarify what the whole situation was.

¶15 Quast’s casual questioning of Miske and his companion fulfilled the public interest. “[T]here is a general public interest in attempting to obtain identifying information from witnesses to police-citizen encounters.” *Id.*, ¶48. Likewise, there is a general public interest in ensuring officer safety. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (“We think it too plain for argument that the State’s proffered justification—the safety of the officer—is both legitimate and weighty.”); *Terry v. Ohio*, 392 U.S. 1, 23 (1968) (“Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.”). Under *Griffith*, this public interest is not outweighed by the de minimis interference with Miske’s liberty interests. “[T]he

brief period of time it takes to ask a question does not unreasonably prolong a temporary detention.” *Griffith*, 236 Wis. 2d 48, ¶56.

¶16 Quast began questioning Miske and his companion after learning of a reported battery to a female by a member of a motorcycle gang. It was 1:00 a.m. on an unlit rural road, Wimmer was questioning a biker and his passenger in front of Quast and Arndt. Quast’s and Arndt’s attention was diverted by the arrival of Miske and his companion. The only way they could travel was either to turn around or to go through the scene, past the officers. The purpose of Quast’s questioning was to quickly assess the situation and determine if Miske and his companion posed a threat to the law enforcement officers or the other biker and his passenger. Both Miske and his companion were free to leave at any time; Quast testified if they had turned around and left he would not have interfered. Accordingly, Miske’s claim that he was unlawfully seized by the officer’s asking where he had been and where he was going fails. Here, both Miske and his companion voluntarily answered Quast’s questions.

¶17 We affirm. It was reasonable for Quast to ask Miske and his companion questions, after they voluntarily stopped, in order to assess any potential threat to the safety of law enforcement officers on the scene.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

